No. 14929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD G. BAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

WILLIAM A. HELSELL
Assistant United States Attorney

Office and Post Office Address:
1012 United States Courthouse
Seattle 4, Washington

No. 14929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD G. BAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney

WILLIAM A. HELSELL
Assistant United States Attorney

Office and Post Office Address:
1012 United States Courthouse
Seattle 4, Washington

BALLARD NEWS, SEATTLE, WASHINGTON — 5/15/56 — 45 COPIES

INDEX

TABLE OF CASES

UNITED STATES CONSTITUTION

STATUTES AND ACTS

EXECUTIVE ORDERS

ADMINISTRATIVE REGULATIONS

COURT RULES

No. 14929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAROLD G. BAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

On March 23, 1955, the appellant, Harold G. Bauer, was charged by indictment in the District Court of the United States for the Western District of Washington, Northern Division, Cause No. 49163, with the unlawful ownership and possession of gold

bullion in violation of Title 12, United States Code, § 95a, and Executive Order 6260, as amended. Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, under the provisions of Title 18, United States Code, § 3231. Since the charge involved possession in the city of Seattle, within the Northern Division of the Western District of Washington, venue was laid in said District Court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure.

The jurisdiction of this Court to review the judgment of the District Court is conferred by the provisions of Title 28, United States Code, § 1291.

II. STATEMENT OF THE CASE

Stripped to its essentials, the indictment in this case (R. 3, 4) charges that on February 12, 1954, at Seattle, Washington, the defendant, who was not a person permitted to own or possess gold bullion by any applicable United States Treasury regulation, nevertheless claimed an interest in and held in his possession 338.90 troy ounces of gold bullion without a duly issued United States Treasury license authorizing such ownership or possession. Appellant does not contest the sufficiency of the evidence to establish his

ownership or possession of the gold. He does not attack the sufficiency of the evidence establishing that the gold bullion was of a type and in such quantities as may not lawfully be possessed without a license. In this Court he attacks only the validity of the Executive Order under which he was charged and the sufficiency of the indictment to state a criminal offense.

III. SUMMARY OF ARGUMENT

Appellee contends that Executive Order 6260, as amended, was in force and effective on February 12, 1954, the date of commission of the offense. Executive Order 6260 was issued August 28, 1933. It was ratified and confirmed by the Gold Reserve Act of 1934 (12 U.S.C. § 213) and it was again approved and ratified by the 1941 amendment to the Trading with the Enemy Act (50 U.S.C., App. § 617). Its validity has been upheld by this Court and by all others which have passed upon the question.

Appellee further contends that the indictment in this case fully and completely states a criminal offense against the laws of the United States, committed by the appellant. It completely advised him of the charge against him and in fact the language of the indictment was, in part, extracted from indictments already held sufficient by this Court in *Ruffino*

v. United States, (9 Cir. 1940) 114 F. 2d 696, and *Farber v. United States*, (9 Cir. 1940) 114 F. 2d 5.

IV. ARGUMENT

A. *Executive Order 6260 Was in Full Force and Effect on February 12, 1954.*

Appellant has clearly delineated the issue before this Court. He does not contend that Executive Order 6260 was invalid when promulgated (Appellant's Brief, p. 29). He concedes that it was valid after January 30, 1934 (the date it was ratified by the Gold Reserve Act of 1934). Appellant further "concedes the possibility" (Appellant's Brief, p. 29) that the Executive Order was valid and in force in 1940 (as well he should in view of the express holding to that effect in *Ruffino v. United States*, *supra*, decided in 1940). Appellant, however, takes the position that Executive Order 6260 somehow withered and died during the years following 1940 and argues that such a conclusion is justified by the alleged absence of any further necessity for the Executive Order. Appellant takes this position despite the fact that the Executive Order was expressly again ratified by the provisions of the 1941 amendment to the Trading with the Enemy Act (50 U.S.C., App. § 617) and despite

the further fact that its validity has been sustained by cases since, the latest of which was decided in 1954.

Executive Order 6260 was authorized by the Act of March 9, 1933, and was an effective exercise of the power therein delegated to the President. In *United States v. Levy*, (2 Cir. 1943) 137 F. 2d 778, the Court said at page 781:

> "But appellant nevertheless cannot succeed on this ground, for we are convinced that Executive Order 6260 was authorized by the Act of March 9, 1933. This court implied as much in *British-American Tobacco Co. v. Federal Reserve Bank of New York, supra*, 2 Cir., 104 F. 2d at page 654, in reasoning which we adopt. In answering the contention that the Act empowering the President to prohibit gold exporting or hoarding did not authorize its requisition for purchase, the Court said, per curiam: 'What better means he could have devised to prevent its "export" or "hoarding", we find it hard to imagine. The whole effort of Congress was to prevent the escape of gold, of which export and hoarding were almost, if not quite, the only available routes. These stopped, the emergency might pass; to stop them it was necessary to have the metal in all its forms where it could be found. That the owner could be compelled to accept the current price for it, has been decided for us; we have only to consider whether the order was within the power granted. We think it was'."

Any possible question as to the validity of Executive Order 6260 at the time of its issuance is laid at rest by the subsequent ratification of the Order by

congressional pronouncements. In *United States v. Levy, supra,* it was further stated:

> "To take the position most favorable to his [appellant's] argument that Executive Order 6260 was unauthorized by the Act of March 9, 1933, we assume this [appellant's possession of gold] occurred prior to January 30, 1934. For if it occurred thereafter, the congressional ratification then had would at least give Executive Order 6260 prospective validity against subsequent violations. *Ruffino v. United States,* 9 Cir., 114 F. 2d 696."

In *Ruffino v. United States, supra,* this Court held as follows:

> "By § 13 of the Gold Reserve Act of 1934, 48 Stat. 343, 12 U.S.C.A. § 213, Congress expressly ratified all orders issued by the President under the act of March 9, 1933, including, necessarily, Executive Order No. 6260. Hence we find no difficulty in holding that the order is valid and effective; and as has been seen it prohibits the acquisition of gold bullion except as therein indicated."

In *United States v. Chabot,* (2 Cir. 1951) 193 F. 2d 287, the Court of Appeals for the Second Circuit discussed at length the operative effect and application of the Gold Reserve Act of 1934 with the provisions of Title 12, U.S.C. § 95a and the provisions of Executive Order 6260, as amended. That court was confronted with a criminal proceeding involving unlawful possession of gold bullion without a license and

from the tenor of the opinion it is apparent that as late as 1951 the Court of Appeals for the Second Circuit entertained no thought that the Executive Order was invalid or that the necessity for the legislation generally had disappeared.

The latest expression of opinion which can be found as to the validity of Executive Order 6260 is in *United States v. Catamore Jewelry Co.*, (D.C. Rhode Island 1954) 124 F. Supp. 846. The District Judge there stated at page 848:

> "Executive Order No. 6260, as amended, made provision for the imposition of criminal penalties for wilful violations thereof. The Gold Reserve Act imposed only civil penalties for all violations whether wilful or otherwise of the regulations issued pursuant thereto. This act does not expressly repeal said Order in whole or in part. On the contrary, section 13 thereof, Title 12 U.S.C.A. § 213, expressly ratified all orders issued by the President under the Trading with the Enemy Act, as amended, including necessarily Executive Order No. 6260, as amended. In my judgment the provisions of section 4 of said Act, Title 31 U.S.C.A. § 443, cannot be said to repeal the penalty provisions of said Order and accordingly said Order was in full force and effect at all times mentioned in said Counts 1, 2, 3, 5, 7, 8, 9 and 10." (citing cases)

It will be noted from the opinion that the indictment covered offenses committed "from on or about July 1, 1949, to and including February 1, 1950."

Appellant argues that because the legislation in question was emergency legislation and because the emergency which spawned the law has ceased to exist, the law itself has ceased to operate. Although the promulgation of the Executive Order and the law which authorized it may well have been suggested by the *existence* of an emergency, there is little doubt that the *source* of the law and the *basis* therefor was the power entrusted to Congress to coin money and regulate the value thereof as provided by Art. I, Sec. 8, Par. 5 of the United States Constitution.

In *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, the Court stated with reference to gold legislation of the depression era, at page 304:

> "The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide 'a sound and uniform currency for the country,' and to 'secure the benefit of it to the people by appropriate legislation.' *Veazie Bank v. Fenno*, 8 Wall. 533, 549."

It does not follow that legislation motivated by the existence of an emergency but based on other valid powers entrusted to Congress under the Constitution, is nevertheless caused to expire by the termination of the emergency. Appellant in his brief (p. 11, 29) concedes that the Gold Reserve Act of 1934 expressly put the United States on a "new permanent mone-

tary basis". No good reason appears why Congress may not as a part of a permanent legislative policy adopt, ratify, and confirm Presidential executive orders earlier issued because an emergency existed. That is exactly what was done by the Gold Reserve Act of 1934 and by the Trading with the Enemy Act as amended in 1941. Counsel for appellant can cite no authority holding that such legislative practices are improper.

Appellant relies heavily on *Chastleton Corp. v. Sinclair*, 264 U.S. 543. He cites that case for the proposition that a law depending upon the existence of an emergency may cease to operate if the emergency ceases or the facts change. It may be conceded that under proper circumstances a law which depends upon the existence of an emergency for its validity *may* cease to operate when the emergency terminates. It is significant that the *Chastleton* case did not hold that the law in question *had* terminated. It simply returned the case to the lower court for the taking of evidence as to whether or not the facts giving rise to the emergency had ended. This Court can hardly take judicial notice that the facts creating the necessity for the gold legislation and the facts requiring the establishment of a new permanent monetary basis for the United States have terminated. Appellant made no effort in the court below to offer evi-

dence to that effect nor could he, for no such evidence is available. Yet he apparently would ask this Court to take judicial notice that sometime in the period after 1940 some change of condition occurred which made it unwise for this country to remain off the gold standard, which rendered the gold legislation unnecessary, and which resulted in the sudden demise of Executive Order 6260. It is significant that no case has ever so held and the matter has been considered by at least three courts since the decision of this Court in the *Ruffino* case.

B. *The Indictment Is Adequate to Charge Criminal Offense.*

Appellant first argues that the designation in the indictment of appellant as "not being a person permitted to hold in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States" is ineffective to establish that his possession of the gold bullion was unlawful.

The quoted language was extracted directly from the indictment which this Court passed upon in *Ruffino v. United States, supra.* The indictment in the *Ruffino* opinion, as shown by the quotation therefrom at page 697, stated:

" 'on or about the fifth day of July, 1939, at Sutter Creek in the County of Amador, within said division and district, said defendant *then and there not being a person permitted to acquire gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States*, did then and there wilfully, unlawfully and knowingly acquire certain gold bullion, in quantity particularly described as approximately 78.50 troy ounces of gold bullion, estimated .840 fine'." (Italics added)

This Court stated with reference to the charge in that indictment:

"While the indictment does not in terms aver that appellant was not within a class excepted by the executive order, it does charge that he was not a person permitted to acquire gold bullion pursuant to Treasury regulation. This language, we think, substantially negatives the possession of a license. The existence of a license was in any event defensive matter and it was not necessary to negative it. *Shelp v. United States*, 9 Cir., 81 F. 694.

"We hold the indictment sufficient to charge an offense denounced by 12 U.S.C.A. § 95a, and by the Presidential order No. 6260."

It will be noted that the present indictment not only alleges that the appellant was not a person permitted to hold gold bullion by Treasury regulation, but it further alleges that he did not have a license permitting him to so hold the gold bullion. The additional phrase was inserted in the indictment upon the basis of the opinion of this Court in *Farber v. United States*,

(9 Cir. 1940) 114 F. 2d 5. It was there argued that the indictment did not sufficiently state an offense because it did not except all the possible conditions under which the appellant might have lawfully held gold coin in his possession. In sustaining the validity of the indictment in the *Farber* case and in answering the appellant's contention that it did not appear that the gold coins possessed were those prohibited by law, this Court stated:

> "But appellant misreads the indictment. He reads it as though the clause 'not having a license * * * authorizing said acquisition of said gold coin by said defendant[s] as aforesaid' is but a general reference meaning no more than had the clause read 'not having a license authorizing the acquisition of gold coin generally'. But the clause is not cast in general terms. It is cast as a definite reference to the act alleged to be unlawful. In fact, to support appellant's interpretation, all that follows the description of the Executive Order might as well not be there, it adds nothing. As it is actually written, it plainly means that appellant acquired certain gold coins; that these gold coins were of such a nature as under the Executive Order could not legally be acquired by one not holding a license so to do. To put it another way, the clause 'authorizing said acquisition of said gold coin by said defendant[s] as aforesaid' does not refer to the acquisition of gold coins generally, but to the gold coins the subject of the alleged unlawful act. This being true, the indictment charges that without a license appellant acquired certain gold coins of the description which cannot be legally acquired without a license."

So in the case at bar the final phrase in the indictment before the Court reciting that the possession of the gold bullion by the defendant was "without a duly issued license authorizing and permitting him to so hold in his possession and retain a legal and equitable interest in said gold bullion" (R. 3, 4) has the direct effect of stating that the defendant was possessed of gold bullion which was in such form that it could not be legally acquired without a license. It is submitted that on the authority of the *Farber* case this is a complete answer to the suggestion by the appellant that the gold bullion referred to in the indictment was somehow not adequately described to identify it as a type of gold bullion which could not lawfully be possessed by this appellant.

Appellant makes the further point that because the indictment only alleges that he held more than 35 fine troy ounces it states no offense. Appellant's contention in this regard is predicated on the 1954 amendment to 31 C.F.R. § 54.18 and § 54.21 which raised the limitation on unmelted scrap gold or gold held for industrial, professional or artistic purposes which might be legally held without a license from 35 to 50 fine troy ounces. But appellant fails to note that the amendment to § 54.18 and § 54.21 of Title 31, C.F.R. was effective on July 14, 1954 (see 19 F.R.

4309). The indictment before the Court charges an offense which occurred on February 12, 1954, and appellant's offense was, of course, governed by the former version of 31 C.F.R. § 54.18 and § 54.21 which imposed the 35 ounce limitation.

SUMMARY AND CONCLUSION

It is submitted that Executive Order 6260, as amended, was in full force and effect on February 12, 1954, the date of the commission of the offense here involved. The Order was valid when issued, it has been subsequently ratified on two separate occasions, and its validity has been sustained by repeated decisions in different courts of appeal including this one. Appellant can find no reported case which even questions its present continuing validity.

It is further submitted that the indictment before this Court fully and fairly charges a criminal offense in violation of the Executive Order and the Federal statute. It was drafted in reliance on and by the adoption of other approved forms of indictment set out by opinions of this Court. It fully and fairly apprises the defendant of the charge against him. Appellant's contentions, and each of them, are without merit.

Respectfully submitted,

CHARLES P. MORIARTY
United States Attorney

WILLIAM A. HELSELL
Assistant United States Attorney